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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 746

THE CORBITT COMPANY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

↓
CLAUDE M. HOUCHINS,
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vs.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The Corbitt Company prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on June 3, 1946, and motion for a new trial denied on October 7, 1946.

Opinion Below

The opinion of the Court of Claims is reported in 66 Fed. Supp. 129 (R. 9-29).

Jurisdiction

The judgment of the Court of Claims was entered June 3, 1946, and the motion for a new trial denied October 7, 1946. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Question Presented

The petitioner sold to the respondent motor trucks equipped with tires and inner tubes at \$7,300.00 each. The tax on the said tires and inner tubes was increased after the bids were opened and prior to delivery. The question is whether the increase in the tax on said tires and inner tubes is to be added to the contract price of \$7,300.00 per truck under the terms of Article 1 of the contract.

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9-14.

Statement

The findings of fact of the Court of Claims may be summarized as follows:

Plaintiff, a corporation, was engaged in the business of manufacturing and selling motor trucks and motor vehicles (Finding 1, R. 9). December 20, 1940, plaintiff, pursuant to a contract, sold to the respondent two hundred motor trucks, complete with tires and tubes, at \$7,300.00 each (Finding 1, R. 9) May 5, 1941, respondent pursuant to option (Finding 4, R. 13), as extended (Finding 1, R. 9) issued Change Order "B" calling for one hundred additional trucks of the same kind and at the same unit price (Finding 1, R. 9). The tires and tubes required were described in the specifications (Finding 2, R. 10). Article 1 of the contract provides (1) for increasing the unit price per truck by the amount of any increase in tax, after the contract was entered into, made applicable directly upon the production, manufacture or sale of the trucks, and (2) that the unit price of \$7,300.00 did not include any Federal taxes

from which exemption is granted or taxes subject to credit or refund under Section 401 of the Revenue Act of 1935 as amended (Finding 3, R. 12). Prior to October 1, 1941, the petitioner delivered to the respondent two hundred trucks each equipped with tires and tubes manufactured by the Goodrich Company for the petitioner in accordance with respondent's specifications (Finding 6, R. 14). The one hundred trucks covered by Change Order "B" were delivered subsequent to October 1, 1941, and were similarly equipped with tires and tubes manufactured by the Goodrich Company for the petitioner in accordance with respondent's specifications (Finding 5, R. 14). After the contract was entered into the Congress increased the sales tax on tires and tubes effective October 1, 1941 (Finding 6, R. 14). The Goodrich Company delivered six hundred of said tires and tubes to the petitioner subsequent to October 1, 1941, and thereupon the petitioner paid to the Goodrich Company the increase in the tax thereon in the amount of \$2,340.00 and the Goodrich Company paid such tax to the respondent through the Collector of Internal Revenue (Finding 7, R. 15). Petitioner and the Goodrich Company, by the purchase order for the said tires and tubes, meant and intended the price of the said tires and tubes should include any additional or increase in the sales tax (Finding 8, R. 15). On April 11, 1942, the contract having been completed, the petitioner rendered an invoice to the respondent for the increase in the sales tax which it had paid to the Goodrich Company in the said amount of \$2,340.00. June 1, 1942, respondent refused payment. September 20, 1942, petitioner protested in writing. Said protest was overruled and the disallowance of payment sustained (Finding 9, R. 16). Detailed specifications, including questionnaire were furnished the petitioner and other bid-

ders along with printed invitations to bid (Finding 10, R. 16). The Goodrich Company manufactured the said tires and tubes in accordance with respondent's specifications and knew that the trucks sold to the respondent were to be equipped therewith by the petitioner (Finding 11, R. 17).

The Court below concluded, as a matter of law, that the petitioner is not entitled to recover, dismissed the petition, rendered judgment for respondent for cost of printing the record, and overruled petitioner's motion for a new trial.

Specifications of Errors to Be Urged

The Court of Claims erred:

1. In holding that the petitioner purchased the tires and tubes for resale, as such, to the respondent.
2. In holding that the increase in the sales tax on the tires and tubes was refundable under Section 401 of the Revenue Act of 1935, as amended, and Section 621 of the Revenue Act of 1932, as amended.
3. In giving judgment for the respondent.

Reasons for Granting the Writ

1. In holding that petitioner purchased the tires and tubes for resale to the respondent, the Court below disregarded the plain provisions of Section 620 of the Revenue Act of 1932 as amended (*infra*, p. 9), imposing the sales tax on tires and tubes used as component parts of the trucks sold to the Government tax free. That rule of law was neither repealed nor modified by the subsequent amendments, namely, Section 620, Act of June 16, 1933 (Public—No. 73—73rd Congress) (*infra*, p. 9) and Section 401, Revenue Act of 1935 (*infra*, p. 10) but was adhered to in

Sections 316.21 and 316.24, Regulations 46 (1940 Ed.) (*infra*, p. 11) promulgated thereunder and Section 316.94 (*infra*, p. 11) included by reference. Under said Section 316.21, tires and tubes are treated as component parts of the tax free trucks and not being sold to the respondent, as such, were taxable. Said Section 316.24 provides for credit or refund of taxes on resales of tax free articles, but includes, by reference, Section 316.94 (*infra*, p. 11) promulgated under Section 621, Revenue Act of 1932, as amended (*infra*, p. 11) which specifically excludes credit or refund of the sales tax on tires and tubes used in the manufacture or production of, or as a component part of a tax free article, such as the truck, sold to the respondent. That is consistent with and corroborated by Section 316.54, Regulations 46 (1940 Ed.) (*infra*, pp. 11-12) which in material part, is set forth for convenience as follows:

“Sales of automobile trucks, taxable tractors, other automobiles and motorcycles, originally equipped with tax-paid tires and inner tubes, to an exempt governmental agency for its exclusive use are not properly to be regarded resales of tires and inner tubes, as such, so as to entitle the manufacturer of such tires and inner tubes to a credit or refund of the amount of tax paid by him thereon.”

The conclusion of the Court below in Finding 11 that the petitioner purchased the tires and tubes for resale, as such, to the respondent is contrary to the facts, law, and regulations. The above regulations were followed until the Secretary of the Treasury, under authority of Section 307 (c) of the Revenue Act of 1943 (Public Law 235, Seventy-eighth Congress, Second Session) issued Mimeograph 5696, Internal Revenue Bulletin, dated June 8, 1944 (*infra*, p. 12), effective June 1, 1944, exempting from the tax, for the duration of the war and for six months thereafter, tires and

tubes used as component parts of articles sold to the War and Navy Departments, but only in those cases where the contract price of the truck or article does not include the tax on the tires and tubes. Clearly, that constitutes a ratification of prior law and regulations otherwise the Secretary of the Treasury would not have required authority from Congress to depart therefrom.

2. In holding that the sales tax on the tires and tubes were refundable the Court below disregarded the plain words of Section 621 of the Revenue Act of 1932 (*infra*, p. 13) prohibiting a credit or refund of tax on tires and tubes used by a manufacturer or producer as component parts of an article sold free of the tax to a governmental agency. That rule of law was neither repealed nor modified by the subsequent amendments, namely, Section 620, Act of June 16, 1933 (Public No. 73—73rd Congress) and Section 401, Revenue Act of 1935 (*infra*, p. 9). These amendments merely clarify the provisions for the credit or refund of the tax on “articles”, such as the trucks, sold free of the tax to a governmental agency. The applicable regulations 46 (1940 Ed.), Section 316.94, promulgated under said Section 621, as amended, for convenience is, in material part, set forth as follows:

“Sec. 316.94 Credits and Refunds—A credit against the tax due on the sale of any article covered by these regulations or a refund may be allowed or made to a manufacturer in the amount of any tax which has been paid by any person with respect to the sale of any article (other than a tire or inner tube) purchased and used by such manufacturer as material in the manufacture or production of, or as a component part of, any such article with respect to which tax has been paid, or which has been sold free of tax in accordance with the provisions of Section 316.21 or 316.22.” See also Section 316.54, *supra*.

The opinion of the Court below would, contrary to the law and regulations, permit the refund of the tax on the tires and tubes on one hand and permit the inclusion thereof in the sales price of the article (truck) on the other hand.

3. In giving judgment to the respondent, the Court below disregarded the provisions of Section 553 of the Revenue Act of 1941 (*infra*, p. 14) shifting the tax on the tires and tubes from the manufacturer thereof (vendor) to the petitioner (vendee), thus the petitioner paid said taxes pursuant to an obligation imposed upon it by statute which brings it within the rule in the case of *Cowden Manufacturing Co. v. United States*, 312 U. S. 134, stated as follows:

"We are of the opinion that the 'Federal Taxes' clause does not obligate the United States to reimburse its contractor for taxes which the latter has borne merely as a matter of contract with its subcontractors. On the contrary, the fair import of the clause is that the United States must make reimbursement only for such taxes as the contractor has paid pursuant to an obligation imposed upon him by the statute which enacts the tax."

The Court below also disregarded the rule stated in *United States v. Kansas Flour Mills Corporation*, 314 U. S. 216-217, relating to the standard tax clause, involved herein, as follows:

"Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected."

4. The decision of the Court below involves the construction of a Federal statute materially affecting the national revenue; is in conflict with *Cowden Manufacturing Company v. United States*; *United States v. Kansas Flour Mills Corporation*, *supra*, and presents a question which has not been settled by this Court. In our opinion, the Court below

has reached a conclusion so erroneous as to constitute a departure from the usual and accepted course of judicial procedure and to call for an exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that the petition should be granted.

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Counsel for Petitioner.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 267:

"SEC. 620. SALE OF ARTICLES FOR FURTHER MANUFACTURE.

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed upon any article (other than a tire or inner tube, or an article taxable under section 604, relating to the tax on furs) sold for use as material in the manufacture or production of, or for use as a component part of, an article to be manufactured or produced by the vendee which will be taxable under this title or sold free of tax by virtue of this section. If the vendee resells an article sold to him free of tax under this section, then for the purposes of this title he shall be considered the manufacturer or producer of such article."

Act of June 16, 1933, c. 96, 48 Stat. 255:

"SEC. 620. TAX-FREE SALES.

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in this title;

(2) for resale by the vendee for such use by his vendee, if such article is in due course so resold;

(3) for resale by the vendee to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

For the purposes of this title the manufacturer or producer to whom an article is sold under paragraph (1)

or resold under paragraph (2) shall be considered the manufacturer or producer of such article. The provisions of paragraphs (1) and (2) shall not apply with respect to tires or inner tubes or articles enumerated in section 604, relating to the tax on furs."

Revenue Act of 1935, c. 829, 49 Stat. 1025:

"SEC. 401. AMENDMENTS TO TITLE IV OF REVENUE ACT OF 1932.

(a) Section 620 (3) of the Revenue Act of 1932, as amended, is amended to read as follows:

'(3) for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia.' "

Regulations 46, (1940 Ed.):

"SEC. 316.21 ARTICLES SOLD TO MANUFACTURERS.—To establish the right to exemption with respect to an article (other than a tire or inner tube) sold for use by the purchaser as material in the manufacture or production of, or as a component part of, a taxable article, the manufacturer must obtain from his vendee, prior to or at the time of sale, and retain in his possession, a certificate as outlined in this section, showing that the vendee is a manufacturer of taxable articles and that the article purchased is to be used by him as material in the manufacture or production of another taxable article or as a component part of such an article.

A manufacturer who purchases an article under an exemption certificate for use in the manufacture or production of a taxable article shall be considered the manufacturer of the article so purchased, and is liable for tax on his use or resale of the article unless the exempt character of the use or resale is established.

It is to be noted that sales of tires and inner tubes may not be made tax free for use as material in the manufacture of, or as a component part of, any article."

Regulations 46, (1940 Ed.):

"SEC. 316.24 SALES TO STATES OR POLITICAL SUBDIVISIONS THEREOF AND TO THE UNITED STATES.—No tax attaches to articles sold by the manufacturer direct to the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia, for its exclusive use, provided the exempt character of the sale is established as required by these regulations.

No sale may be made tax free by the manufacturer to a dealer for resale to the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia, even though it is known at the time of the sale that the article will be so resold. However, where any dealer resells a tax-paid article to any of the governmental units named above, for its exclusive use, the manufacturer who paid the tax to the United States on his sale of the article may secure a refund or credit in accordance with the provisions of section 316.94."

Regulations 46, (1940 Ed.):

"SEC. 316.94 CREDITS AND REFUNDS.—A credit against the tax due on the sale of any article covered by these regulations or a refund may be allowed or made to a manufacturer in the amount of any tax which has been paid by any person with respect to the sale of any article (other than a tire or inner tube) purchased and used by such manufacturer as material in the manufacture or production of, or as a component part of, any such article with respect to which tax has been paid, or which has been sold free of tax in accordance with the provisions of section 316.21 or 316.22."

Regulations 46, (1940 Ed.):

"SEC. 316.54 * * * Sales of automobile trucks, taxable tractors, other automobiles and motorcycles, originally equipped with tax-paid tires and inner tubes,

to an exempt governmental agency for its exclusive use are not properly to be regarded resales of tires and inner tubes, as such, so as to entitle the manufacturer of such tires and inner tubes to a credit or refund of the amount of tax paid by him thereon."

Mimeograph 5696, Internal Revenue Bulletin, June 8, 1944:

"1944-13-11785
Mim. 5696

Termination of certain governmental excise tax exemptions.

TREASURY DEPARTMENT,

Office of Commissioner of Internal Revenue,

Washington 25, D. C., June 8, 1944.

Collectors of Internal Revenue and Others Concerned:

In section 307 of the Revenue Act of 1943, amendments were made to the Internal Revenue Code which terminated certain governmental excise tax exemptions effective June 1, 1944. Section 307(c) of the Revenue Act of 1943 provides that the Secretary of the Treasury is empowered to authorize exemption from taxes imposed by Chapters 19, 29, and 30 of the Internal Revenue Code as to any particular articles or services or class of articles or services to be purchased for the exclusive use of the United States if the Secretary determines that the imposition of such taxes with respect to such articles or services will cause substantial burden or expense which can be avoided by granting tax exemption and that the full benefit of such exemption if granted will accrue to the United States.

Under the authorization of the Secretary of the Treasury dated May 31, 1944, exemption from taxes imposed under section 3400 of the Internal Revenue Code, as amended, relating to tires and inner tubes is

granted when such tires and inner tubes are sold under appropriate tax-exemption certificates to any person for use as component parts in the manufacture of an article which is to be sold direct to the War Department of the United States or direct to the Navy Department of the United States at a price not including the tax on the tires and tubes.

Unless sooner terminated, the above authorization will expire at the close of the last day of the sixth full calendar month following the date of the termination of hostilities in the present war.

It will be noted that the above authorization limits the exemption to those tires and inner tubes which are sold for use as component parts in the manufacture of articles which are sold direct to the War and Navy Departments, and is not applicable to those tires and inner tubes sold for use as a component part in the manufacture of articles sold to other branches of the Federal Government.

Any correspondence in reference to this mimeograph should refer to the symbols MT.

JOSEPH D. NUNAN, JR.,
Commissioner."

Revenue Act of 1932, c. 209, 47 Stat. 267:

"SEC. 621. CREDITS AND REFUNDS.

(a) A credit against tax under this title, or a refund, may be allowed or made—

(1) to a manufacturer or producer, in the amount of any tax under this title which has been paid with respect to the sale of any articles (other than a tire or inner tube) purchased by him and used by him as material in the manufacture or production of, or as a component part of, an article with respect to which tax under this title has been paid, or which has been sold free of tax by virtue of section 620, relating to sales of articles for further manufacture."

Revenue Act of September 20, 1941, c. 412, Title V, 55 Stat. 720:

“SEC. 553.

(a) **TAX PAYABLE BY VENDEE.**—If (1) any person has, prior to the effective date of Part V of Title V of the Revenue Act of 1941, made a bona fide contract for the sale on or after such date, of any article with respect to the sale of which a tax is imposed by that Act or an existing rate of tax is increased by that Act, and (2) such contract does not permit the adding to the amount to be paid under such contract of the whole of such tax or increased rate of tax, then (unless the contract prohibits such addition) the vendee shall, in lieu of the vendor, pay so much of the tax as is not so permitted to be added to the contract price.

(b) **TAX PAID TO VENDOR.**—Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated, and shall be collected and paid to the United States by the vendor in the same manner as provided in section 3467. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner who shall cause collection of such taxes to be made from the vendee.”

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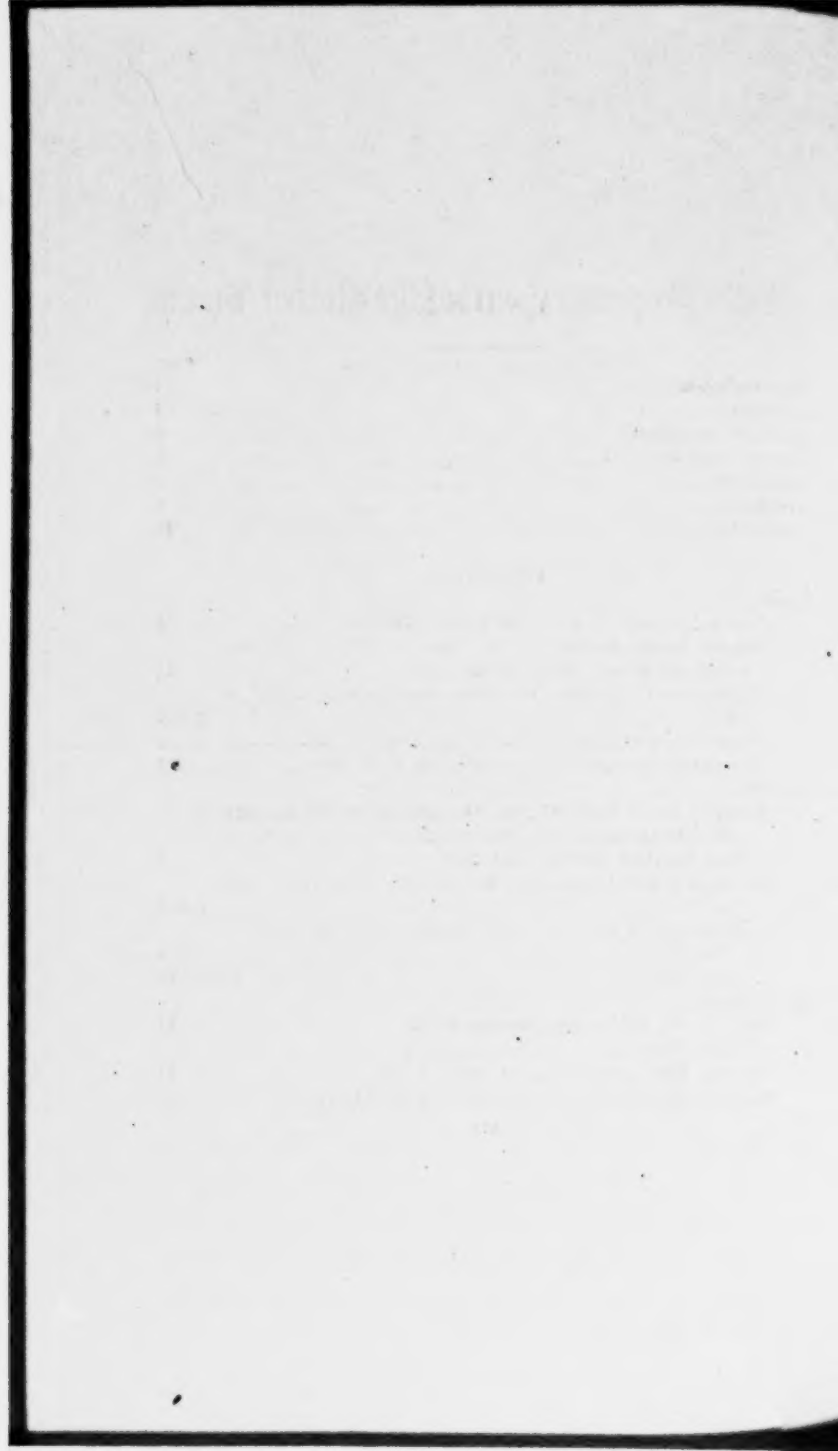
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 746

THE CORBITT COMPANY, PETITIONER

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 9-29) is reported in 66 F. Supp. 129.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1946 (R. 31). Petitioner's motion for new trial was overruled on October 7, 1946 (R. 31). The petition for a writ of certiorari was filed on December 5, 1946. The jurisdiction of this Court is invoked under Section

3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the "federal tax clause" of a standard form government contract for the sale of motor trucks, which provides for the reimbursement of the contractor by the Government in the event that Congress, subsequent to the opening of the bid, increases or imposes new taxes *directly* upon the production, manufacture, or sale of the supplies covered by the contract, can be extended to include reimbursement for subsequently increased taxes imposed upon automobile tires and tubes, component parts of the subject matter of the contract, where the contracting parties agree that the stated price does not include federal taxes as to which a credit or refund is provided under Section 401 of the Revenue Act of August 30, 1935, 49 Stat. 1014, 1025, 1026, as amended, and the payment of this tax has been made by the contractor pursuant to its agreement to reimburse the manufacturer of tires and tubes for any additional taxes he might be required to pay.

STATUTE INVOLVED

Section 553 of the Revenue Act of 1941, 55 Stat. 687, 720, adding Section 3453 to the Internal Revenue Code, provides:

(a) *Tax Payable by Vendee.*—If (1) any person has, prior to the effective date

of Part V of Title V of the Revenue Act of 1941, made a bona fide contract for the sale on or after such date, of any article with respect to the sale of which a tax is imposed by that Act or an existing rate of tax is increased by that Act, and (2) such contract does not permit the adding to the amount to be paid under such contract of the whole of such tax or increased rate of tax, then (unless the contract prohibits such addition) the vendee shall, in lieu of the vendor, pay so much of the tax as is not so permitted to be added to the contract price.

(b) *Tax Paid to Vendor.*—Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated, and shall be collected and paid to the United States by the vendor in the same manner as provided in section 3467. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner who shall cause collection of such taxes to be made from the vendee.

STATEMENT

On December 20, 1940, petitioner, a truck manufacturer of Henderson, N. C., entered into a contract with the United States to furnish 200 six-wheel Army trucks, complete with tires and tubes corresponding to Army specifications, at the contract price of \$7,300 each (R. 9). Article 1 of the contract (R. 4, 12-13), provided that the contract price included any existing federal tax

applicable to the material purchased under the contract; that in the event Congress, subsequent to the date of the opening bid, changed or imposed new taxes applicable directly upon the production, manufacture, or sale of the supplies covered by the contract and these taxes were paid by the contractor, the contract price would be increased or decreased accordingly and any amount due the contractor as a result of such change would be reimbursed by the Government; and that the contract price did not include any federal tax as to which a credit or refund is provided under Section 401 of the Revenue Act of August 30, 1935, 49 Stat. 1014, 1025-1026, as amended. The contract permitted the Government, at its option, to increase the number of trucks called for by the contract not to exceed 100 (R. 14). On May 5, 1941, pursuant to this option, 100 additional trucks of the same kind and price were ordered by Change Order B (R. 9-10).

Prior to the delivery of the 100 trucks specified by Change Order B, Congress enacted the Revenue Act of September 20, 1941, 55 Stat. 687. Section 535 of this Act, 55 Stat. 687, 709, increased the federal sales tax on tires and tubes by more than 100 percent, effective October 1, 1941 (R. 14-15).

Petitioner did not manufacture the 600 tires and 600 tubes required for these trucks (R. 9) but purchased them from B. F. Goodrich Company, Akron, Ohio, under separate purchase orders dated June 6 and June 30, 1941, which specified

that the tires were to be used on government defense projects and must conform to certain government specifications (R. 14). The price quoted in the purchase orders was "f. o. b. Henderson, N. C. *and including tax*" (R. 15). [Italics supplied.] These tires and tubes were delivered to petitioner subsequent to the effective date of the Revenue Act of 1941, and petitioner, pursuant to the purchase orders, paid the Goodrich Company \$2,340, the amount of the increased taxes (R. 15). That company paid such amount to the United States (R. 15).

The contract between petitioner and the United States was completed April 11, 1942, and on that date petitioner submitted an invoice to the United States in the amount of \$2,340, asserting that this sum was due under Article 1 of the contract. Liability for this amount was denied by the Government (R. 16), and on September 11, 1944, the present action was instituted, petitioner alleging that by Section 553 of the Revenue Act of 1941,¹ *supra*, pp. 2-3, it became liable for the increased taxes and that accordingly it was entitled

¹ This section provides that in cases where bona fide contracts of sale of goods covered by the Act are made prior to its effective date and do not permit the addition of the whole amount of the tax to the contract price, the vendee, in lieu of the vendor, shall pay so much of the tax as is not permitted to be added to the contract price; that taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated, and shall be collected and paid to the United States by the vendor.

to reimbursement pursuant to Article 1 of the contract (R. 1-3). The Government contended that the only articles called for by the contract of December 20, 1940 were trucks; that no tax was payable on such trucks and none was collected; that the increased tax on tires and tubes was not applicable directly to "supplies covered by this contract" within the meaning of Article 1 thereof; and that hence the rule announced by this Court in *United States v. Cowden Manufacturing Company*, 312 U. S. 34, precluded recovery by petitioner (R. 21). The court below held that it was unnecessary to consider whether or not the *Cowden* case was controlling because Section 401, Title IV, of the Revenue Act of August 30, 1935, exempted both the Goodrich Company and the petitioner, purchaser for resale to the United States, from payment of the taxes here paid (R. 18-29).

ARGUMENT

1. The question presented is narrow and is one which has been previously determined by this Court. Briefly stated, it is whether the "federal tax clause," contained in the standard form government contract here involved, relates only to taxes "made applicable directly upon the production, manufacture, or sale" of the supplies covered by the contract or whether it can be extended to include additional taxes which petitioner paid to the subcontractor-manufacturer

of the tires and tubes, component parts of trucks which were "the supplies" called for by government contract. In *United States v. Cowden Manufacturing Company*, 312 U. S. 34, this Court held that under an identical contract provision the United States was not obligated to reimburse the contractor for subsequently enacted cotton processing taxes where the contractor, pursuant to an agreement with its subcontractor, had reimbursed the subcontractor for such tax. This Court held that the contract provision was "precise" and that the tax must be "made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract." It held that a tax on the cloth, thread, and labels which entered into the mechanics' suits, the "supplies" there contracted for, was not a tax applicable to the articles called for by the contract (*id.*, p. 36). It also held that a contrary construction would introduce difficulties not contemplated by the parties since it would force them to trace all subsequently imposed federal taxes back to the one upon whom the obligation to pay first rested, whether the transactions were simple or complex (*id.*, p. 37). In the instant case, as petitioner not only recognizes but urges (Pet., pp. 4-6), the tires and tubes became a component part of the "supplies" called for by the contract. We accordingly submit that the rule of the *Cowden* case requiring that, in order to bring the "federal tax clause" into play, the tax be directly imposed

upon the "supplies," is dispositive of the instant controversy.

2. The court below held that it was unnecessary to determine whether the *Cowden* case was controlling because of what it conceived to be the essential difference in facts between the two cases (R. 22). It held that the contract and specifications here involved, reasonably interpreted, provided for the sale of tires and tubes to the Government and that because Section 401, Title IV, of the Revenue Act of 1935 (49 Stat. 1014, 1025-1026), which amended Sections 620 and 621 of Title IV of the Revenue Act of 1932 (47 Stat. 169, 267), as amended by Sections 4 (a) and (c) of the Act of June 16, 1933 (48 Stat. 254, 255), exempts certain sales to the Government from the taxes, both petitioner and its subcontractor, B. F. Goodrich Company, were exempted from the payment of taxes on such articles. Petitioner does not contest the correctness of this conclusion in a case where there is a separate and distinct sale, but urges (Pet., pp. 6-7) that the conclusion conflicts with applicable law and regulations insofar as they prohibit a credit or refund of tax on tires and tubes used by a manufacturer as a *component part* of an article sold free of the tax to a governmental agency. This argument begs the question. If the tires and tubes constitute a component part of the article sold, then, under the *Cowden* case, *supra*, the federal tax clause does not apply. If they

are not a component part, but constitute an article separate and distinct from the trucks which constitute the main subject matter of the contract, then the objections which petitioner urges to the decision below are inapplicable.

3. Moreover, petitioner may not recover for a second reason set forth in the *Cowden* case. There this Court likewise held that the fair import of the "federal tax clause" was that the United States need reimburse its contractor only for such taxes as the contractor paid pursuant to an obligation imposed by statute and that it was not obligated to reimburse the contractor for taxes which the latter had borne as a matter of contract with its subcontractors (*id.*, p. 36). Petitioner contends (Pet., p. 7) that the *Cowden* case is inapplicable in this aspect because it paid the taxes in question pursuant to the obligation imposed upon it by Section 553 of the Revenue Act of 1941, *supra*, pp. 2-3, rather than by contract.² We submit that petitioner's purported distinction lacks substance.

Section 553 of the Revenue Act of 1941 merely provides for the shifting of the manufacturer-

² Curiously, petitioner relies upon a dictum in the *Cowden* case, the decision in which case stands unequivocally against it. It also relies upon a dictum in *United States v. Kansas Flour Corp.*, 314 U. S. 212, a case in which this Court held that a contractor who had collected a processing tax from the United States pursuant to contract, but which had not paid that tax to the Government because the tax had been held to be illegal, was required to refund the amount so collected. We perceive no force to the dictum, torn from its context.

vendor's excise tax to a vendee in those cases where the parties themselves have not permitted it by the terms of their purchase agreement, unless they have specifically contracted against it.³ In the instant case, however, petitioner's contract with the tire manufacturer, which specified that the price quoted was "*f. o. b. Henderson, N. C. and including tax*" (R. 30, 31) [*Italics supplied*], required the excess taxes to be added to the contract price of the tire-tube purchase agreements. Contrary to petitioner's contention, the increased tax which it paid was not paid pursuant to a statutory mandate, but rather in accordance with the agreement between itself and its manufacturer-vendor.

³ The legislative history of Section 553 reveals that its purpose was to provide protection to a manufacturer-vendor who inadvertently had failed to protect himself by contract. S. Report No. 673, 77th Cong., 1st Sess., p. 54, states:

"This section also adds an existing-contracts section to the Internal Revenue Code. This section is quite similar to the existing-contracts section included in the Revenue Act of 1932 when the last large bloc of manufacturers' sales taxes was imposed. Your committee believes that provision should be made permitting tax liability to be shifted from the manufacturer to the vendee in the case of sales contracts entered into before the effective date of the particular sales tax or increased rate of tax, but consummated after that date, where the contract does not permit the inclusion of the tax in the sales price. This affords relief to those cases where manufacturers have not been able to protect themselves by inserting a tax clause in their sales contracts to provide that taxes, such as those included in the bill, would be passed on to their vendees. The clause in question is, in language, quite

It is also clear that the tax in question was not imposed upon petitioner, but rather on the manufacturer of tires and tubes purchased by petitioner to produce the final product for sale to the Government. Mere reimbursement of those taxes by the contractor to its vendor pursuant to a contractual obligation does not render it a taxpayer. *Oswald Jaeger Baking Co. v. Comm'r.*, 108 F. 2d 375 (C. C. A. 7), certiorari denied, 309 U. S. 683; *Zinsmaster Baking Co. v. Comm'r.*, 109 F. 2d 738 (C. C. A. 8); cf. *Lash's Products Co. v. United States*, 278 U. S. 175.

close to the text of section 625 of the Revenue Act of 1932, which now appears as section 3447 of the Internal Revenue Code. * * *"

Senator George explained its object as follows: "This amendment is solely for the purpose of protecting the vendor where the vendor has a bona fide existing contract with the vendee which does not permit him to add the tax." 87 Cong. Rec. 7273 (Sept. 3, 1941).

The Conference Report on the Act, H. Rep. No. 1203, 77th Cong., 1st Sess., dealt with Section 553 as follows:

Amendment No. 141:

"This amendment permits liability for a manufacturers' excise tax imposed by the bill to be shifted from the manufacturer to the vendee in any case where, prior to the effective date of part V of title V of the bill (October 1, 1941, under amendment No. 156), any person has made a bona fide contract for the sale after that date of any article with respect to the sale of which a tax is imposed or the existing tax is increased by the bill and such contract does not permit the adding of the tax, unless the contract prohibits such addition. The House recedes" (p. 18).

For an administrative interpretation to the same effect, see pertinent regulations of the Bureau of Internal Revenue, 26 C. F. R., 1941 Supp., Section 316.3, which provide that "* * * The purpose of section 3453, added by section 553 (b) of the

CONCLUSION

The decision of the court below is clearly correct and there exists no conflict. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

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Revenue Act of 1941, is to shift under certain conditions the liability for a tax, or for an increase in existing rate of tax, imposed by the Revenue Act of 1941, from the manufacturer to the vendee. The conditions under which such liability is shifted are as follows: First, there must be a bona fide contract made by the manufacturer prior to October 1, 1941, for the sale on or after such date of an article with respect to which a manufacturers' excise tax is imposed, or the rate of an existing manufacturers' excise tax is increased, by the Revenue Act of 1941; second, the contract does not provide for the addition of such tax or increase in tax to the amount payable thereunder; and third, the contract does not expressly or by implication prohibit such addition to the contract price. Where these conditions are present, the vendee becomes liable for the tax or additional tax imposed by the Revenue Act of 1941. In all other cases, the liability remains upon the manufacturer and the full amount of the tax is payable by him."